IN THE

Supreme Court of the United States

October Term, 1943.

No. .....

C. M. HARGROVE,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, C. M. Hargrove, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the aforesaid entitled cause on January 7,

1944, (R. 258), rehearing denied February 7, 1944 (R. 263), affirming the judgment of the United States District Court for the Western District of Texas, San Antonio Division, entered on January 19, 1943, and sentenced petitioner on the same date (R. 34-41), the co-defendants, Cavett and Leigh were placed on probation. Petitioner was fined $5000.00 and sentenced to 12 months imprisonment (R. 39-40).

SUMMARY.

The indictment (R. 2) charging petitioner, jointly with 2 others, (J. C. Cavett, Jr. and T. P. Leigh) contains 11 counts. Petitioner, together with his two co-defendants, were charged with violating Sec. 17(a) (1) of the Securities Act of 1933 (15 U. S. C. 77q (a) (1)), (employing a scheme to defraud in the sale of securities by the use of the mails); 18 U. S. C. 338 (using the mails for the purpose of executing a scheme to defraud); Sec. 17(a) (2) of the Securities Act of 1933, (15 U. S. C. 77q (a) (2)), (obtaining money by untrue statements of a material fact in the sale of securities by the use of the mails); 18 U. S. C. 88 (conspiracy to commit an offense against the United States).

The first count of the indictment charges that the defendants employed a scheme to defraud, by the use of the mails, in the sale of shares of common stock of Teachers Annuity Life Insurance Company, in alleged violation of Sec. 17(a) (1) of the Securities Act of 1933 (15 U. S. C. 77q (a) (1)). The second, third and fourth counts charge

the same offense, each count alleging a different letter to have been sent through the mails.

The fifth, sixth and seventh counts of the indictment allege the same scheme as alleged in the first count, but charge that the defendants used the mails for the purpose of executing said alleged scheme in violation of 18 U. S. C. 338, the said 5th, 6th and 7th counts differing from one another only in alleging a different letter to have been sent through the mails.

The eighth, ninth and tenth counts of the indictment charge that the defendants obtained money by means of untrue statements of material facts in the sale, by the use of the mails, of shares of common stock of Teachers Annuity Life Insurance Company, in alleged violation of Sec. 17(a) (2) of the Securities Act of 1933 (15 U. S. C. 77q (a) (2)). The said 8th, 9th and 10th counts are identical with one another except that each alleges the mailing of a different letter to a different purchaser of stock. The alleged untrue statements of material facts, as alleged in said 8th, 9th and 10th counts, are substantially the same as the alleged scheme to defraud charged in the first seven counts.

The eleventh count of the indictment charges that the defendants conspired to commit the offenses alleged in the first 10 counts, (18 U. S. C. 88).

OPINION OF THE COURT BELOW.

The District Court (Keeling, D. J.), filed no opinion. The Circuit Court of Appeals, in affirming, wrote an opinion (per Waller, C. J.) (R. 256) not yet officially reported.

JURISDICTION.

The Judgment of the Circuit Court of Appeals, affirming the conviction of petitioner was entered on January 7, 1944, (R. 258). Petitioner's application for a rehearing was denied on February 7, 1944, (R. 263). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C. 347). See also Rule 11 of Criminal Appeals Rules promulgated by this Court on May 7, 1934.

STATUTES INVOLVED.

I. The mail fraud statute (Criminal Code Section 215, 18 U. S. C. 338, as amended), reads, in part, as follows:

> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter * * * shall be fined not more than

$1000 or imprisoned not more than five years, or both."

II. "Sec. 17(a) (1) of the Securities Act of 1933 (15 U. S. C. 77q (a) (1)—Employing a scheme to defraud in the sale of securities by the use of the mail, reads, in part, as follows:

(a) "It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communications in interstate commerce or by the use of the mails, directly or indirectly . . ."

(1) "To employ any device, scheme or artifice to defraud . . ."

III. Sec. 17(a) (2) of the Securities Act of 1933 (15 U. S. C. 77q (a) (2))—obtaining money by untrue statements of a material fact in the sale of securities by the use of the mails, reads, in part, as follows:

(a) "It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communications in interstate commerce or by the use of the mails, directly or indirectly—"

(2) "To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading . . ."

IV. 18 U. S. C. 88—Conspiracy to commit an offense against the United States, reads, in part, as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined, etc. . . ."

STATEMENT OF THE CASE.

The indictment (R. 2), alleges that petitioner, with two others, did violate the statutes aforesaid, all of the counts being predicated upon a certain scheme or artifice to defraud persons named in the indictment and others alleged to be unknown to the Grand Jurors.[1]

The nature of the scheme as alleged, is in substance, as follows: That petitioner brought about the creation of a corporation named "Teachers Annuity Life Insurance Company", with an authorized capital stock of $100,000.00; that petitioner had theretofore induced by misrepresentations, three men, engaged in the real estate business in San Antonio to execute and deliver to him an appraisement showing the value of the property to be $275,000.00.[2] It is alleged that petitioner knew that that valuation was in excess of the market value of the prop-

[1] The use of the mails is the gist of the offense, but the scheme to defraud is the gravomen.

[2] No effort was made, on the trial of the case, to prove that the appraisement was procured by any misrepresentations. It appears that the allegation has been abandoned.

erty. The appraisement of the propery was made, and the corporation was created in May, 1936; that petitioner filed photostatic copies of the appraisement with the Texas Board of Insurance Examiners, and with the Office of the Secretary of State at Austin. The property had been purchased for $123,000.00 by a trust controlled by petitioner on a vendor's lien note, no cash being paid at the time. The property was transferred by the trust to the Teachers Annuity Life Insurance Company, which company paid as a consideration 9970 shares of the common stock, of which ultimately petitioner received from the trust which he controlled, 4900 shares of the par value of $10.00 each. These shares were subsequently offered for sale to the investing public at $30.00 a share through petitioner and his co-defendants, Cavett and Leigh.[3]

The false statements alleged to have been made were as follows:[4] That members of the medical profession were told that if they invested in the stock of the company they would receive appointments as medical examiners for the company, and would receive lucrative fees for examinations made; that petitioner and his co-defendants would convert to their personal funds substantial funds so received from investors; that the money received from investors would become part of the assets of the company and would be used to build up the insurance business of the company;[4a] that the company was selling a large

[3] The evidence shows that petitioner made one sale. No misrepresentations were proved as to that sale. (R. 106.)

[4] All of this has to do with ten sales made three or four years after the corporation was organized, that is to say, in 1939-1940. Petitioner's sales (R. 106); Leigh sales, (R. 50, 62, 67, 78, 102); Cavett sales, (R. 82, 87, 91, 97).

[4a] The evidence shows that substantially all of money received was used to further the interests of the company.

amount of insurance throughout the State of Texas, and had earned large annual profits through the sale of insurance; that insurance salesmen and medical examiners for the company were making large earnings through the sales of insurance policies of the company; that the company was a prosperous going concern, and that its assets had been accumulated from the earnings of the company; that the company had a paid-in capital of $100,000.00 and a surplus of $52,000.00;[5] that the par value of the stock was $10.00 per share, and that because of substantial profits from the operation of the company the market price had risen to $30.00 per share, and would doubtless go higher; that the par value of the stock was $30.00 per share; that medical examiners for the company in other localities were receiving regular examination fees from the company, and a percentage of premiums collected on the policies, which fees and percentages were bringing a substantial return; that stock could be and would be paid for by making a small down-payment with the balance thereon to be liquidated by fees earned as medical examiners for the company; but instead the personal note taken from the investor of said stock was immediately sold to a bank in the locality where the investor resided, and the investor was required to pay said note to the holder thereof; that the investor as medical examiner for the company would receive a substantial return on his investment, through examination fees, and a percentage of all premiums collected on insurance policies sold in the locality through the efforts of agents; it then being alleged

[5] It was contended by the Government that this was false as the only asset of the Company was the real estate, and that asset was overvalued. No substantial proof was offered to sustain this charge.

that all of the statements were false and untrue, to the knowledge of petitioner.

The Company was organized in May, 1936. It being alleged that the charter was procured fraudulently by showing that the company had assets worth $275,000.00; the basis of the false statement as to value was that the building would form the principal asset of the company, was not worth that sum of money.[6]

There is no fraud alleged in connection with the sale of any stock during the first 3 years of the operation of the company; that is to say, from May, 1936, to the year 1939. Ten sales of stock were alleged and proved, all to doctors during the years 1939 and 1940. The defendant, Leigh, sold stock to 5 doctors; the defendant, Cavett, sold stock to 4 doctors. Petitioner sold stock to only one doctor. The sales by Leigh were to Doctors Mills, Brandau, Carr, Frank and Atkinson (R. 50, 62, 67, 78, 102). The sales by Cavett were to Doctors Girdner, Hunt, Nelson and Lusk (R. 82, 87, 91, 97). The sale by petitioner was to Dr. Richter (R. 106).

SPECIFICATION OF ERRORS.

1. The Court below erred in declining to set forth in the opinion the legal propositions raised, and in giving inadequate consideration to the issues presented.

2. The Court erred in failing to set aside the judgment of the District Court when its finding of fact was

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[6] No proof was offered to show that any statement in connection with the obtaining of the charter was false. On the contrary, the evidence shows that a full disclosure was made to the State officers, who also admitted that they were familiar with the property involved. (R. 143.)

as follows: "we cannot say that there was no substantial evidence upon which the verdict and judgment of the Lower Court was based."

3. The Court erred in affirming the trial court's finding that petitioner was guilty of any count in the indictment, in that the evidence offered failed, as a matter of law, to support the judgment of guilty on any count.

4. The Court erred in finding that there was any substantial proof offered by the Government to support the judgment of guilty on any count in the indictment.

5. The Court erred in holding *sub silentio* that it was proper to charge a scheme to defraud the State by obtaining a charter from the State by misrepresentations in 1936 with an unrelated and disconnected scheme to defraud alleged to have occurred in 1939-1940 by selling stock through misrepresentations; the record disclosing no clear and consistent theory as to the identity of the fraudulent scheme as to petitioner.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. The Circuit Court Appears To Have Given Inadequate Consideration To Important Propositions Of Law Presented To It For Adjudication By Petitioner And Thus So Far Departed From The Accepted And Usual Course of Judicial Proceedings As To Call For The Exercise Of This Court's Power Of Supervision.

The Court disposed of the issues involved in this intricate transaction without any statement of the facts or

the points of law raised. Actually there was no conflict in the testimony on any material part of the case. It was seriously argued that there was no direct evidence of any fraud or misrepresentations made by or with the authority of petitioner.

The appeal in this case was not predicated upon the proposition that any evidence in the case was false, but the appeal was based upon the proposition that there was no substantial evidence of petitioner's guilt.

We submit, that such question is one of law, which does not require the appellate court to retry the facts, and that the consideration of the question is not controlled or precluded by the fact that the trial court personally heard the witnesses and observed their demeanor. All the testimony in the record was analyzed and the proposition of law was squarely placed before the court for decision; that there was no substantial evidence that petitioner devised a scheme to defraud or obtain money by means of any fraud or misrepresentations made by him, or with his authority. The Government's brief failed to point out any error of omission in appellant's brief, either as to the summary or as to the analysis of the evidence set forth in the brief, and likewise failed to point to any substantial evidence of appellant's guilt. Petitioner, therefore, appeals to this court for relief, as he stands convicted of serious offenses in a case where neither the court nor Government Counsel has set forth any testimony which could be regarded as substantial evidence of his guilt.

II. In Holding That Where An Appellate Court Cannot Say That There Was No Substantial Evidence Upon Which The Verdict And Judgment Of The Lower Court Was Based That Such Judgment Cannot Be Disturbed, The Circuit Court Of Appeals Has Decided A Question Of Federal Law In A Way Probably In Conflict With Decisions Of This Court, And Decisions Of Other Circuit Courts Of Appeal.

The Circuit Court of Appeals has stated that

> "We are not triers of fact. The law, in its wisdom, does not authorize this Court to substitute the reactions as to the facts which it gains from a perusal of the cold, printed type for those of the lower Court which saw and heard the witnesses, observed their demeanor on the stand, and thus was placed in far better position to know the true and false than this Court; and where, as here, we cannot say that there was no substantial evidence upon which the verdict and judgment of the lower Court was based, the verdict and judgment of the Court below will not be disturbed."[7]

As we read this opinion, the Circuit Court of Appeals has departed from the usual test as to whether or not the judgment of the Lower Court should stand. Heretofore, when the Court found that record was in such condition that it does not show substantial evidence upon which the verdict and judgment of the Lower Court is based, the verdict and judgment of the Court below would, as a matter of law, be reversed. It has been held that "unless

[7] This is the entire opinion of the Circuit Court of Appeals.

there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse the judgment against the accused."[8]

But here, the Circuit Court states that it "cannot say that there was no substantial evidence upon which the verdict and judgment of the lower Court was based", and for that reason states that "the verdict and judgment of the Court below will not be disturbed". We submit, that it is only when the appellate court can affirmatively say that there is substantial evidence upon which the verdict and judgment of the lower Court was based, that it is proper not to disturb such judgment. This seems mere common justice and fair play, to which defendants tried in federal courts are entitled. The very least they could expect in this enlightened age is to have the appellate court say to them, "There is substantial evidence in the record on which the lower court could have acted". It is quite another matter where a negative statement is given to the effect that the Court cannot say whether there is substantial evidence in the record or not. This seems so plain that to say more would merely be to labor the point.

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[8] Salinger v. U. S., 23 F. (2d) 48 (8th C.). See also McClintock v. U. S., 60 F. (2d) 839 (10th C.); Chambers v. U. S., 237 F. 513 (8th C.); Isbell v. U. S., 227 F. 788 (8th C.); Moore v. U. S., 56 F. (2d) 794 (10th C.); Read v. U. S., 42 F. (2d) 636 (8th C.); Spalitto v. U. S., 39 F. (2d) 782 (8th C.); Durland v. U. S., 161 U. S. 306; Sandals v. U. S., 213 F. 569 (6th C.); Rudd v. U. S., 173 F. 912 (8th C.) c/f U. S. v. Corlin, 44 Fed. Suppl. 940; Yusem v. U. S., 8 F. (2d) 6 (3rd C.).

It may be argued that the court means to say that there is substantial evidence in the record, but certainly the language used in this opinion does not justify such an assumption.[9] On the contrary, the negative language used gives every evidence of meaning that the court is predicating its decision on a reliance on the finding of the judge of the lower Court who observed the demeanor of the witnesses on the stand, and thus was placed in a far better position to know the true and false than the Circuit Court was. This is particularly so since we strenuously argued that no substantial evidence was actually offered, and none pointed out in the government brief. *A fortiori* is it so when the court itself has not seen fit to set forth one line in its opinion to show that there is any substantial evidence in the record, nor has the court indicated that there was even a conflict in the evidence to be resolved by the lower court.[9a] The Circuit Court clearly means that it cannot point out any substantial evidence in the record upon which the verdict and judgment of the lower Court was based, for if it could, it would have been a simple matter to add a few more paragraphs to the opinion, and state what that evidence was, or at any rate to state affirmatively that such evidence was in the records.[10]

[9] The law gives persons convicted of crime the right to apply to this Court for certiorari, but where the Circuit Court states only ultimate facts, that right is curtailed, if not actually denied them. This, we submit, would be a proper case for this Court to determine the right of a litigant to have the opinion of the Circuit Court make findings of fact and state the conclusions of law in order that his right to apply to this Court may be preserved—or at least simplified.

[9a] It was seriously argued that there was no conflict on any fact in the record.

[10] Judge Waller had been on the bench only a few months when this case was heard.

III. In Holding That Where The Circuit Court Is Unable To Say That There Is No Substantial Evidence On Which The Verdict And Judgment Of The Lower Court Was Based, That The Verdict And Judgment Of The Lower Court Could Not Be Disturbed, The Circuit Court Of Appeals Has Decided A Question Of Federal Law Erroneously, In That The Record Clearly Shows That There Was No Substantial Evidence On Which A Legal Verdict And Judgment Could Be Sustained, Thus The Circuit Court Of Appeals Has Decided A Federal Question Probably In Conflict With Applicable Decisions Of This Court, And Decisions Of Other Circuit Courts of Appeal.

To simplify this matter as much as possible, we set forth the following facts. The Insurance Company was formed in May, 1936. No fraud is alleged in connection with the sale of any stock during the first three years of the operation of the company. Both of petitioner's co-defendants, Leigh and Cavett, who sold all of the stock, (except to one doctor), which is the subject of the indictment, were jointly tried with petitioner. They both testified in their own behalf. Their interests were adverse to that of petitioner. It was to their interests to put the responsibility for any statements which they made upon petitioner instead of upon themselves, but they both testified that petitioner told them not to misrepresent the stock. Mr. Leigh testified:

> "He (referring to petitioner) clearly advised me to be sure to make no misrepresentation in the sale of any of the stock, anything connected with this company." (R. 164.)

Mr. Cavett testified:

> "Yes, sir, Mr. Hargrove would try to give me instructions about selling this stock, *but I was that enthused over it that I run over his head and went out and told my own story.* Mr. Hargrove's instructions were, he particularly cautioned me to show the charter. To be sure to read every part of it to them. *His next instructions, be careful not to over-stretch it. Not to over-stretch it. Now I began to talk about a man making millions out of it. That was my idea.*" (R. 196, 197.)

The important thing is that there is no evidence in the record that petitioner ever authorized the making of any statements, representations or promises which the doctors claim were made to them ,nor that he ever knew of any such statements, representations or promises at any time before the transactions were finally consummated. The only direct evidence is that petitioner never so much as even suggested the making of any such statements, representations or promises; and this evidence comes from witnesses who were testifying against their own interest.

The record shows that petitioner sold one share of stock to a Dr. Richter. This Doctor appeared as a witness for the Government (R. 106). There is nothing in his testimony to substantiate any misrepresentations that is set forth in the indictment. This is significant.

To summarize therefore, there is no evidence in the record to show that petitioner made any false statements, or that he authorized his co-defendants, who were selling

the stock, to make them, but, on the contrary, these co-defendants have testified that they were cautioned not to make them, and one of the defendants has admitted that he ran over petitioner's head and told his own story.

So that the evidence negatives any connection of petitioner with any statements made by these two co-defendants. As to the obtaining of the charter, some three years previous, there is no evidence in the record to show that any false pretenses were made in that connection.

And as to the contention that the appraisement of the building, which was the principal asset of the company, was obtained by misrepresentations, that has been abandoned by the government, and properly so, for none of the three men who made the appraisement, and who were prominent real estate men in the City of San Antonio, were called as witnesses. They found that in 1936 the building was worth in their opinion $275,000. One witness was called by the government to give his opinion as to the value of the building, and he said it was, in his opinion, worth less, but numerous witnesses have testified as to its value as follows:

Lucchese, in 1937, (R. 178)	$287,000
Lucas, in 1940, (R. 180)	286,715
Tipton, in 1940, (R. 183)	265,230
Stoner, in 1937, (R. 203)	292,340
Bedell, in 1938, (R. 207)	323,750
Reutzel, Rogers & Flannery, in 1936 (R. 145)	275,000

The average of those appraisals is more than $288,000. The appraisers were all real estate men of long experience in San Antonio. One of them (Tipton) was formerly the official appraiser for the Home Owners' Loan Corporation (R. 183). Another of them (Stoner) had made appraisals of all property in San Antonio for the City for tax purposes in 1921, appraisals for Bexar County in 1918 and 1931 and a partial appraisal for the City in 1918 (R. 202).

In addition to those appraisals, there is the fact that the Life Insurance Commissioner and the Board of Insurance Commissioners of the State of Texas also appraised the property at $275,000.00, acting upon their own records, investigations and familiarity with the property over a long period of years.

Be that as it may, the value of real estate is necessarily a matter of opinion. "Misrepresentations as to value cannot ordinarily constitute a fraud because they are generally to be regarded as mere expressions of opinion or 'trader talk' involving a matter of judgment and estimation as to which men may differ."[11] That statement applies especially to real estate. None of the doctors who bought the stock claimed that he relied upon any statement as to the value of the real estate.

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[11] 37 Corpus Juris Secundum 334; see also Yusem v. U. S., 8 F. (2d) 6, (3rd C.).

IV. In Affirming The Judgment Of The District Court Without An Affirmative Finding That There Was Substantial Prooof On Which The Verdict And Judgment Of The District Court Was Based, The Circuit Court Of Appeals Has Decided A Question Of Federal Law Probably In Conflict With Applicable Decisions Of This Court And Decisions Of Other Circuit Courts of Appeal.

We contend that there was no substantial evidence upon which the verdict and judgment of the District Court was based, and we submit that there was not even substantial circumstantial evidence in the case to justify conviction.

In *McClintock v. United States,* 60 Fed. 2d 839, the Circuit Court of Appeals for the 10th Circuit, in reversing, for insufficient evidence, a conviction for using the mails to defraud, said:

> "The motion for directed verdict presents the question of whether there was substantial evidence of McClintock's guilt to take the case to the jury. Moore v. United States (C. C. A. 10) 56 F. 2d 794; Isbell v. United States (C. C. A. 8) 227 F. 788. The evidence against McClintock was wholly circumstantial. *IF IT WAS AS CONSISTENT WITH INNOCENCE AS WITH GUILT, THE MOTION SHOULD HAVE BEEN GRANTED.* Moore v. United States, supra; Chambers v. United States, (C. C. A. 8) 237 F. 513; Isbell v. United States, supra; Read v. United States (C. C. A. 8) 42 Fed. 2d 636; Spalitto v. United States (C. C. A. 8) 39 F. 2d 782."

In the case at bar, we submit that there is no evidence of a single misstatement of fact made or authorized by petitioner. If there is any evidence of bad faith or fraud on his part it is circumstantial evidence; and we earnestly submit to the court that all of the evidence in the case not only is "as consistent with innocence as with guilt" but that it is more indicative of innocence than guilt; that the entire course of conduct of appellant is more indicative of a *bona fide* effort and desire by the appellant to build a life insurance company than to defraud; that the efforts, time and expense put into the company over the period of years is inconsistent with any conclusion other than that he was sincerely trying to overcome obstacles to the progress of his company and to make it a success. Certainly, the entire circumstances over the years, as shown by the Government's witnesses and by the uncontradicted testimony, do not prove beyond a reasonable doubt that defendant was conducting a scheme to defraud.

In *Sandals v. United States*, 213 Fed. 569 (6th C.), the defendants had been convicted in the trial court on charges of using the mails in a scheme to defraud. The alleged fraud consisted in making false and extravagant claims as to oil lands belonging to a corporation in which the defendants were selling stock. The Circuit Court of Appeals reversed the conviction because the trial judge told the jury that "in the clear light that time and reflection affords us, we can see that whoever bought this oil stock * * * was bound to lose money, * * * that the scheme was bound to work a loss" and that "it was bound to fail".

Although the trial judge went on, in his charge to the jury, to disclaim any purpose to control the jury, the Circuit Court of Appeals reversed the conviction because those remarks constituted an incorrect statement of law. On this point the Circuit Court of Appeals said:

> "We cannot repress the feeling that these portions of the charge operated to eliminate the question of good faith. The solution of that question was not to be found in retrospection; most men are wise after the fact. Expressions coming from the court to the effect that, looking back at the transactions, 'this scheme was bound to work a loss, * * * was bound to fail', were calculated to charge defendants with a degree of foresight, when entering upon and carrying out their enterprise, which was inconsistent with an honest belief in either its merits or success, even though such belief might in truth have existed.
>
> "A man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure, be incapable of committing conscious fraud. Human credulity may include among its victims even the supposed imposter. If the man accused in the instant case really entertained the conviction throughout that the oil properties and the stock in dispute possessed merits corresponding with their representations, they did not commit the offense charged. As Mr. Justice Brewer said in Durland v. United States, 161 U. S. 306, 313, 16 Sup. Ct. 508, 511 (40 L. Ed. 709):
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> " 'The significant fact is the intent and purpose. The question prestented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable

> or not. If the testimony had shown that this Provident Company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme.'

"In Rudd v. United States, 173 Fed. 912, 913, 97 C. C. A. 462, 463 (C. C. A. 8th C.), the scheme to defraud and the circulars sent through the mails to promote it concerned a machine designated as an attachment to a pump for lifting water, which was shown to be 'contrary to well-known fundamental physical laws'. In respect of the defense of honest belief in the efficiency of the machine, Judge Hook said:

> " 'The main defense was that, though the machine may have been impracticable, the accused honestly believed in its efficiency, and that what he did was without intent to defraud. Of course, if this was so, there was no violation of the law which was designed to prevent the use of the post office in intentional efforts to despoil.' "

The above language was recently quoted with approval by U. S. District Judge Yankwich in *U. S. v. Corlin*, 44 Fed. Suppl. 940, in holding defendants not guilty of using the mails to defraud. In the *Corlin* case, the Judge added:

> "No person can be convicted of the offense unless it be shown, beyond a reasonable doubt, that he, *knowingly*, devised a scheme to defraud and that the mails were used in furtherance of it. The offense

is one requiring specific intent. Without it, the offense cannot be committed. Because of this, good faith of the accused is a complete defense." (Italics are the Court's.)

The above quotations from the *Sandals* and *Corlin* cases are a correct statement of the law, as established by the unbroken line of decisions of all of the courts, including this Court. We assume that the principle will not be questioned.

The above mentioned principles have particular application to the case at bar. Petitioner had a life insurance company which was duly constituted by the State of Texas. The company was chartered in 1936 by the Board of Insurance Commissioners of Texas (R. 213). On May 5, 1937, the Board of Insurance Commissioners of the State of Texas granted it a permit to write life insurance (R. 135), granted it another such permit on January 25, 1939, and another on August 16, 1940 (R. 135). The form of policy to be written by the company was also approved by the Board of Insurance Commissioners (R. 148, 153). The evidence shows without contradiction that not a single misrepresentation was made in obtaining said charter, permits and approval. The affidavit attached to the charter showed that the assets of the company consisted of an equity in real estate and that there was a lien against it for $123,000.00. The evidence shows without contradiction that the Board of Insurance Commissioners were familiar with the property and had been familiar with it for many years, knew that there was an indebtedness against it in the amount of $123,000.00, and

that they acted in full knowledge of all of the facts (R. 141-153). The company wrote $600,000.00 of life insurance, all of which was reinsured with the Lincoln National Life Insurance Company (R. 110, 119). The policy holders were protected. No policy holder lost a cent.

It was therefore a question solely of whether the company could be made a success for the stockholders.

It is true that the company subsequently failed as far as the stockholders were concerned. Beset as it was by suits, hearings and other attacks, it could hardly have done otherwise than fail even if it had been flush with excess capital. But there is no evidence in the record that petitioner intended for the company to fail nor that he expected it to fail. As a matter of fact, we do not know even now, with the benefit of hindsight, but what the company might have succeeded if it had not been almost constantly throttled by suits, abortive and otherwise. We do know that it is a matter of common knowledge that some of the largest and most successful companies in the United States started on a shoestring.

The evidence shows that petitioner was not experienced in managing an insurance company, but, visionary and impractical as he may have been, we submit that the uncontradicted evidence shows that he had an ambition to build an insurance company and that he tried to do so the best that he knew how. The uncontradicted testimony of the Government's own witness is "I think that Mr. Hargrove did the best he could to make this a company" (R. 111). No officer of the company received any

pay (R. 114). Certainly, as shown by the uncontradicted evidence, petitioner kept doggedly at the job of trying to keep the company going. He is bound to have spent thousands of dollars of his own money in that endeavor, making trips over the country, many of them with lawyers, necessarily paying large attorneys' fees and other expenses in connection with the many suits, hearings and applications. The uncontradicted testimony shows that he always acted with the assistance and advice of attorneys. While some of his plans may now seem to us to have been visionary and impractical, none of his transactions were concealed; they were all open, and most of them were done in consultation with the Life Insurance Commissioner of the State of Texas and the life insurance commissioners of other states.

As said by this Court in *Durland v. U. S.*, 161 U. S. 306, 313, if a defendant believed in his enterprise, "no conviction could be sustained, no matter how visionary might seem the scheme". And, as said by Judge Yankwich in the *Corlin* case "no person can be convicted of the offense unless it be shown, beyond a reasonable doubt, that he *knowingly* devised a scheme to defraud". "The offense is one requiring specific intent. Without it the offense can not be committed. Because of this, good faith of the accused is a complete defense".

Where the evidence is equally consistent with the good faith and good intentions of the defendant as it is with fraudulent intention, the defendant should be acquitted. In the case at bar, not only is all of the evidence just as

consistent with the good faith, hopes and good intentions of petitioner as it is with a fraudulent intention, but on the contrary, we submit that the uncontradicted evidence shows overwhelmingly the good faith, hopes and intentions of petitioner to make the Teachers Annuity Life Insurance Company a successful life insurance company. Certainly he would not have kept doggedly at it, month after month and year after year, spending his own time and money and overcoming almost every conceivable obstacle merely to sell a few paltry shares of stock to doctors here and there. If petitioner had intended for this insurance company to fail, he certainly would not, for the few shares of stock which he sold, have spent so much time and expense in trying to keep the company going.

It is a matter of common knowledge that where there is a fraudulent scheme from the beginning to sell stock, the big effort is made in the stock selling campaign and very little effort is made for the benefit of the company. In this case, the reverse was true. The big effort, in time, expense and in every other way, was made for the benefit of the company and to keep it going, in comparison with which the effort to sell stock was very small indeed.

The conduct and activities of petitioner during all the years pertinent to this case show that he was trying to build a life insurance company.

V. In Holding Sub Silentio That A Scheme To Defraud By Misrepresentations In 1936 Was Properly Charged With "A Disconnected And Unrelated Scheme To Defraud Alleged To Have Occurred In 1939 And 1940, By Selling Stock Through Misrepresentations Was Proper; There Being No Clear And Consistent Theory As To The Identity Of The Fraudulent Scheme In Connection With Petitioner, The Circuit Court Of Appeals Decided A Federal Question Probably In Conflict With Applicable Decisions Of Other Circuits.

As to this point, we are quoting the argument from the brief (pp. 14-18) presented to the Circuit Court, as follows:

> "In entering upon an examination of the indictment and evidence in this case we find ourselves confronted at the outset with a situation similar to that encountered by the Circuit Court of Appeals for the 6th Circuit in the case of *Hendrey v. United States*, 233 Fed. 5. In that case, too, there had been a conviction upon an indictment charging the use of the mails in a scheme to defraud, and the conviction was reversed by the Circuit Court of Appeals, which said:
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> > "'A careful reading of the nearly 2,000 typewritten pages of the trial record discloses no clear and consistent theory as to the identity of the fraudulent scheme in connection with which the respondents were on trial; the proceedings during the two weeks of trial indicate fluctuating views as to what the real issue was; and so it becomes additionally necessary to find and identify this scheme in the indictment.'

"The court then goes on to examine the indictment, finds that it charged a number of transactions relating to the operation of several different banks, that many of the alleged transactions could not have operated to defraud the parties claimed to have been defrauded, etc. The court, for example, said (referring to the indictment):

> " 'Reference to other varying and fraudulent schemes, having to do with all the banks or having to do with the Memphis bank only, can be extracted from this indictment, but none of these schemes could be carried into execution or attempted to be—save in the most remote and consequential way—by mailing to Patterson the copy of the Memphis newspaper. The scheme or artifice in furtherance of which this semiannual statement was sent to him must have been something which could be furthered or which defendant thought could be furthered by such sending.
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> " 'However, if it be assumed that a construction is possible which would make the broad, general, four-state scheme the one upon which the indictment depends, the prosecution is no better off. Upon that theory, it would not be supported by any evidence justifying conviction.' "

The court reversed the conviction in that case.

"Although the trial record of the case at bar does not contain 2,000 pages and the trial lasted only four or five days instead of two weeks, we believe that every other statement made by the Circuit Court of Appeals in the *Hendrey* case applies to the case at bar. In our case, the alleged scheme to defraud is

set forth in the first count of the indictment, and is adopted by reference in counts 2, 3, 4, 5, 6 and 7. Counts 8, 9 and 10 (under Sec. 17(a) (2) of the Securities Act) repeat verbatim so much of the first count as alleges the making of false and fraudulent representations. The 11th count charges a conspiracy to commit the offenses charged in the first 10 counts.

"Reverting to the first count, it contains 15 numbered paragraphs. The 15th paragraph alleges the mailing of a letter in 1939. Incidentally, all of the letters in all of the counts were alleged to have been mailed in 1939 and 1940. Although paragraphs 1 to 14 of the first count purport to allege a scheme to defraud, as a matter of fact the only definite and connected scheme to defraud which 'can be extracted from this indictment', as the court said in the *Hendrey* case, is that contained in paragraphs 1, 13 and 14, which charge a plan to sell stock in the Teachers Annuity Life Insurance Co. by means of alleged false representations. The alleged representations are set forth in subparagraphs (a) to (j), inclusive; and those subparagraphs are all that is copied from the first count into counts 8, 9 and 10. The alleged sales of stock of the Teachers Annuity Life Insurance Co. and all representations alleged to have been made in connection therewith took place in 1939. Paragraphs 2 to 12 of the first count relate to various events occurring between 1933 and 1939, none of which (as the court said in the Hendrey case) 'could be carried into execution or attempted to be by mailing' the letter alleged in any count.

"It is difficult to fathom, for example what paragraph 6 is driving at in charging the substitution of a photostatic copy of an appraisal for the original.

However, the evidence failed to show that action of any kind was ever taken on the photostatic copy and failed to show that the original was 'withdrawn and canceled by the persons who executed the same' (the indictment doesn't say who they were), so it is unnecessary to try to solve the riddle. The last part of paragraph 5 charges that defendant Hargrove made affidavit that the life insurance company had assets of $275,000 cash value when he 'well knew the only assets to be the above described building and real estate'. It is not clear what the prosecution was driving at in that allegation, unless they meant to imply that it was unlawful for an insurance company to be organized with assets consisting only of real estate. As we have already shown, that is not the law in Texas. Here again, however, it is not necessary to try to divine what role this allegation was intended to play, because it turned out that the affidavit in question (Ex. 15) not only clearly showed that the assets consisted of the building and real estate referred to, but the affidavit went on with further candor to state that the real estate was subject to a vendor's lien in the amount of $123,000.00. Sub-paragraph (f) of paragraph 13 of the first count of the indictment charges that defendants represented that the par value of the stock was $10.00 a share, and paragraph 14 charges that that representation was false. The indictment contradicts itself in the next sub-paragraph (g), of the same count, which says that the part value of the stock was $10.00 a share after all, but that defendants represented it to be something else.

"There is like confusion in the remainder of the indictment as to any 'clear and consistent theory as

to the identity of the fraudulent scheme' attempted to be charged. The point we make here is not in the nature of an exception to the form of the indictment. The point is this: The court must look both to the indictment and to the evidence in order to decide whether the indictment and evidence, taken together, are sufficient to sustain a finding of guilty beyond a reasonable doubt *(Salinger v. U. S., supra)*. We submit that the situation here is similar to that in *Hendrey v. U. S., supra*, and that this court must necessarily do what the court did in the Hendrey case, that is, try to extract from the indictment a 'clear and consistent theory as to the identity of the fraudulent scheme' attempted to be charged."

If the Circuit Court of Appeals gave any consideration to this phase of the case, the opinion does not so indicate, although it was squarely raised and presented for decision as the court can see from the aforesaid quotation from our brief.[12]

CONCLUSON.

For the foregoing reasons, petitioner, by his solicitors, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to the end that the case may be reviewed, and

[12] It appears that this result was brought about by a disinclination of the Court to state the facts, and to fully adjudicate and deal with the legal questions fully spread on the record. This court has committed itself to a larger duty in reviewing claims of prejudice. C/f New York C. R. Co. v. Johnson, 279 U. S. 310; Berger v. U. S., 295 U. S. 78.

determined by this Court, and the judgment of the Circuit Court of Appeals reversed.

Respectfully submited,

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